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No. 92-853

In the Supreme Court of the United States

October Term, 1992

SANDERS CONFECTIONERY PRODUCTS INC., a Michigan corporation; JOHN M. SANDERS; FILIPP KREISSL,
Petitioners,

SAM J. MERIGIAN, on behalf of himself and all persons who were shareholders of Sanders Confectionery Products, Inc., as a Class Action Under FRCP 23(a) and 23(b),
Petitioner,

v.

HELLER FINANCIAL, INC., a Delaware corporation; BUTZEL, KEIDEN, SIMON, MYERS & GRAHAM, a Michigan partnership; JOHN WM. BUTLER JR.; JAY ALIX,
Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS, HELLER FINANCIAL, INC., BUTZEL, KEIDEN, SIMON, MYERS & GRAHAM, and JOHN WM. BUTLER, JR., IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In May, 1988, the United States Bankruptcy Court for the Eastern District of Michigan entered an Order confirming a reorganization plan for a chapter 11 debtor, Fred Sanders, Inc. ("FSI"). Nine months later, Sanders Confectionery Products, Inc. ("SCPI"), the parent of FSI, as well as two of SCPI's directors and officers, and one of its stockholders, all Petitioners herein, brought an action in the United States District Court for the Eastern District of Michigan against FSI's lender, Heller Financial, Inc. ("Heller"), Heller's attorneys, John Wm. Butler, Jr. ("Butler") and his firm, Butzel, Keiden, Simon, Myers & Graham ("Butzel, Keiden"), and FSI's bankruptcy trustee, Jay Alix, alleging claims of "lender liability", federal securities fraud, and RICO. The district court dismissed the action, holding that it was barred by the doctrine of *res judicata*. The district court also dismissed the federal securities fraud and RICO claims on the alternate ground that the factual allegations purportedly supporting these charges did not state any claim upon which relief could be granted. The United States Court of Appeals for the Sixth Circuit affirmed the district court's dismissal of Petitioners' claims.

In this challenge to the *res judicata* effect of the Confirmation Order entered in the FSI chapter 11 case, the questions presented are as follows:

1. Whether the district court and the court of appeals properly determined that Petitioners' claims of lender liability, federal securities fraud, and RICO should have been brought in the FSI chapter 11 case and, therefore, were barred by the doctrine of *res judicata* when asserted in the subsequent district court action?

2. Whether the district court and the court of appeals properly rejected Petitioners' arguments that the doctrine of *res judicata* could not bar their claims because certain of those claims would have been "related proceedings" and not "core proceedings" if the claims had been asserted in the FSI chapter 11 case?

3. Whether the court of appeals properly affirmed the dismissal of Petitioner Merigian's federal securities fraud claims because he failed to plead sufficient facts in the district court which would establish that Heller was liable to Merigian as a "controlling person" of SCPI, the primary perpetrator of Petitioners' alleged stock fraud?

RULE 29.1 STATEMENT

Petitioner Sanders Confectionery Products, Inc. is a publicly-held corporation with its principal place of business in Detroit, Michigan. Respondents are unaware of any parent, subsidiary, or affiliate corporations of SCPI.

Respondent Heller Financial, Inc. is a wholly-owned subsidiary of Heller International, Inc., which is a wholly-owned subsidiary of The Fuji Bank, Limited.

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On Petition for Writ of Certiorari
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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents, Heller Financial, Inc., Butzel, Keiden, Simon, Myers & Graham, and John Wm. Butler, Jr. (collectively, Heller), respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the August 17, 1992 Opinion of the United States Court of Appeals for the Sixth Circuit in this cause.

OPINIONS BELOW

The Sixth Circuit's Opinion is reported at 973 F.2d 474 (6th Cir. 1992). The Memorandum Opinion and Order of the United States District Court for the Eastern District of Michigan is not reported.

COUNTERSTATEMENT OF JURISDICTION

Heller agrees with Petitioners that this Court has jurisdiction to review the petition for writ of certiorari filed by Petitioners Sanders Confectionery Products, Inc., John M. Sanders, and Filipp Kreissl (collectively "SCPI") pursuant to 28 U.S.C. §§1254(1) and 2101(c).[1]

In this case, Petitioners invoked the original jurisdiction of the district courts to hear cases involving federal questions pursuant to 28 U.S.C. §1331. Contrary to Petitioners' repeated suggestions in their Petition, this case does not in any way arise from the denial of a demand for a jury trial made during the course of a bankruptcy case.

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES INVOLVED

Title 28 of the United States Code, Sections 1334(a), (b) provide:

> §1334. Bankruptcy cases and proceedings
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original

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1 Respondents respectfully suggest that the Court is without jurisdiction to review the Petition purportedly filed by Petitioner Sam Merigian because Respondents believe that Merigian died on November 18, 1991, more than six months ago, and no proper substitution has been made on his behalf in this Court pursuant to Rule 35.1. Heller respectfully suggests, therefore, that Merigian's Petition is either moot or his claims have abated. A copy of Merigian's Death Certificate is attached as Respondents' Appendix A. Further the fact that Merigian filed his case as a class action on behalf of himself and all other SCPI stockholders similarly situated does not affect the mootness of Merigian's Petition because the District Court never certified this case as a class action.

and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Title 28 of the United States Code, Sections 157(a), (b)(1), (c)(1), and (d) provide, in relevant part:

§157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

* * * * *

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de

> novo those matters to which any party has timely and specifically objected.
>
> * * * * *
>
> (d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . .

Rule 38(d) of the Federal Rules of Civil Procedure provides, in relevant part:

> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by the party of trial by jury . . . .

COUNTERSTATEMENT OF THE CASE[2]

Nature of the Case

In this case, the United States Court of Appeals for the Sixth Circuit held that the district court properly concluded that

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2 Pursuant to Supreme Court Rule 24.2, Respondents submit this Counterstatement of the Case to correct inaccuracies and omissions in the Statement of the Case set forth in the Petition for Writ of Certiorari.

the doctrine of *res judicata* barred all claims asserted by Petitioners SCPI, Sanders, and Kreissl, based on a final judgment entered by the United States Bankruptcy Court for the Eastern District of Michigan confirming a plan of reorganization involving the chapter 11 debtor, FSI. In reaching this conclusion, the court of appeals applied the proper legal test utilized by the federal courts in determining whether a claim is barred by *res judicata*. Petitioners do not contest in their Petition that the *res judicata* analysis engaged in by the court of appeals was contrary to established law.

The Sixth Circuit also held that the district court properly dismissed Petitioner Merigian's federal securities fraud and RICO claims because, under existing law (a) Merigian failed to plead sufficient facts in the district court to establish a "control relationship" between Heller and SCPI, the alleged primary violator of the federal securities laws (as well as a Petitioner in this Court), (b) Merigian failed to plead any facts demonstrating that SCPI acted with the requisite scienter in connection with its alleged violation of Section 10(b) of the 1934 Securities Exchange Act, §15 U.S.C. §78j, and Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5, as required by the Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and (c) Merigian failed to allege sufficient facts in the district court to establish that Heller committed any predicate acts which would constitute a violation of the federal RICO statute, 18 U.S.C. §1961 *et seq.* By their Petition for a writ of certiorari, Petitioners have asked this Court to review the court of appeals' decision that the district court correctly applied the law to their claims.

Facts Giving Rise to This Lawsuit

On February 15, 1986, Heller and FSI entered into a Loan and Security Agreement (hereinafter "Loan Agreement") pursuant to which Heller provided a loan to FSI in an amount up to $2.45 million. SCPI was the parent and sole shareholder of FSI. Petitioner Sanders is chairman of the board of SCPI and held the same position at FSI at all times relevant to this case. Petitioner Kreissl is president of SCPI and held the same position at FSI.

Respondent Butzel, Keiden and one of its partners, Respondent John Wm. Butler, Jr., were Heller's attorneys and represented Heller throughout most of its discussions and negotiations with FSI regarding the Loan Agreement.

In late 1986 and early 1987, SCPI, the parent of FSI, engaged in a public stock offering which, according to Petitioners, was quite successful. SCPI issued a prospectus in connection with its stock offering with an effective date of December 9, 1986. Petitioners alleged in the district court that "Heller certified as of December 9, 1986 that [FSI] was a borrower in good standing." This "certification" apparently was made in a letter sent to the attorneys preparing the SCPI offering prospectus. Petitioners did not plead any other facts in the district court relating to Heller's involvement in the preparation of the SCPI prospectus. Heller was not alleged to have sold any securities to Petitioners or to have participated in the sale of SCPI stock to any person. In fact, Petitioners Sanders and Kreissl did not allege in the district court that they ever purchased any SCPI stock during the offering even though they also brought federal securities fraud claims against Heller in the district court. Despite the success of SCPI's public offering, by November 1987, FSI had defaulted on its obligations under the parties' Loan Agreement and, on November 13, 1987, Heller filed a claim and delivery action against FSI in the Circuit Court of Oakland County, Michigan to foreclose on its loan to FSI. On November 16, 1987, six months *after* the completion of the SCPI stock offering, FSI filed a petition seeking relief under chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Michigan.[3]

After proper notice, the Bankruptcy Judge held a hearing on November 20, 1987 on FSI's Motion for Authorization for Debtor-In-Possession to Borrow Funds. At this hearing, FSI was represented by counsel. The bankruptcy court subsequently entered a "Consent Order Authorizing Debtor-in-Possession to Bor-

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3 The bankruptcy case was entitled *In the Matter of Fred Sanders, Inc.*, Case No. 87-06979-B, the Honorable George Brody, presiding.

row Funds From First Secured Creditor, etc." (hereinafter "Consent Financing Order").

The Consent Financing Order approved and incorporated by reference the Post-Petition Loan and Security Agreement previously executed by Heller, FSI and Petitioners SCPI, Sanders, and Kreissl (hereinafter "Post-Petition Loan Agreement"). The Post-Petition Loan Agreement permitted Heller to provide discretionary interim financing to FSI during the pendency of the chapter 11 case. In exchange for post-petition financing, FSI, SCPI, Sanders and Kreissl agreed that they had "no claims, setoffs or defenses" to Heller's exercise of any of its rights as a creditor. FSI, SCPI, Sanders, and Kreissl also agreed to waive any claims or defenses relating to FSI's obligations to Heller and any claims which contested "the conduct of [Heller] in administering the Financing Arrangements or otherwise."

On December 4, 1987, the Creditors' Committee and Heller, believing that cause existed to replace existing management, moved to appoint an operating trustee for FSI. At the hearing on this motion, FSI, again represented by counsel, made no objection. The bankruptcy court appointed Jay Alix as Trustee. Within one week after his appointment as Trustee of FSI, Alix discharged Kreissl and assumed control of FSI's business.

The bankruptcy court subsequently held an extensive hearing on the objections to the Consent Financing Order on December 21, 1987. Following further negotiations among the parties in interest, and two additional hearings before the court, on January 7, 1988, the bankruptcy court entered a "Supplemental Consent Order Amending and Confirming Initial Financing and Adequate Protection Order" (hereinafter "Supplemental Consent Financing Order"). The Supplemental Consent Financing Order was approved as to form and substance by FSI's counsel, as well as by the Trustee, Heller and a number of other creditors. In this order, the bankruptcy court "confirmed, approved and ratified" the earlier Consent Financing Order, and determined that Heller's claims under the Loan Agreement were valid and "not subject to any claims, set-offs or defenses by [FSI]." Additionally, the Order "forever barred" all parties in interest from suing Heller for any

claims "arising or related to its Loan Agreement with FSI." The bankruptcy court also specifically determined that the Supplemental Consent Financing Order was a final order "in accordance with Bankruptcy Rule 7054 and Federal Rule of Civil Procedure 54(a)." No appeal was taken from the entry of the Supplemental Consent Financing Order nor was its reconsideration ever sought.

On April 27, 1988, the bankruptcy court held a hearing on the three competing plans of reorganization for FSI, one of which was proposed by Petitioners SCPI, Sanders, and Kreissl. At this hearing, SCPI withdrew its plan because it had failed to deposit $500,000 in earnest money as required by a prior order of the bankruptcy court. The bankruptcy court was then advised that the reorganization plan proposed by Trustee Alix had been withdrawn in favor of a plan proposed jointly by the union representing FSI's workers and Country Home Bakery of Michigan, Inc. Following a full hearing, and in strict compliance with 11 U.S.C. §1129, the bankruptcy court confirmed the Union/Country Home Plan and entered an "Order Confirming Third Amended Plan of Reorganization of the United Distributive Workers, Council 30" on May 4, 1988 (hereinafter "Confirmation Order"). The Confirmation Order contains an express finding that the Union/Country Home Plan had been "proposed in good faith" and "not by any means forbidden by law."

The Confirmation Order approved the classification and treatment of different classes of claims and interest. All holders of FSI capital stock, *i.e.*, SCPI, were placed in "Class 10" and their interests were "extinguished." The holders of Class 10 claims objected to the treatment of their claims and by reason of the extinguishment of their interests, were deemed to have rejected the Union/Country Home Plan under 11 U.S.C. §1126(g). The Confirmation Order was properly entered over the shareholder's objection pursuant to the power contained in Section 1129(b)(2)(C) of the Bankruptcy Code. The assets of the Debtor's estate and the name "Fred Sanders" were then sold on May 20, 1988 to Country Home pursuant to the Confirmation Order and Country Home continues to operate the business today. Although they were deemed to be parties to the FSI chapter 11 case, Peti-

tioners SCPI, Sanders, and Kreissl never asserted or scheduled any lender liability, securities fraud, or RICO claims during the FSI chapter 11 case. Also, Petitioners never timely demanded a jury trial on any claim they could have asserted in the FSI chapter 11 case.

Course of This Litigation Below

Petitioners sued Heller, Butzel, Keiden, and Butler in the United States District Court for the Eastern District of Michigan in February 1989, approximately eight months after the entry of the Confirmation Order and more than two years after the SCPI stock offering. Jay Alix, the Trustee for FSI in its chapter 11 case, was also sued by Petitioners for his alleged complicity in the bankruptcy court's entry of the Confirmation Order approving the sale of FSI's assets to Country Home. In their various complaints filed in the district court, Petitioners sought relief under a variety of state and federal statutes, including claims brought under the 1933 Securities Act, 15 U.S.C. §77l(2), the 1934 Securities Exchange Act, 15 U.S.C. §78j, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, the federal criminal statutes prohibiting bankruptcy fraud, 18 U.S.C. §§151-155, and various pendent state law "lender liability" claims. On August 8, 1990, the district court dismissed all of Petitioners claims pursuant to Respondents' Rule 12(b)(6) motions to dismiss. In its Memorandum Opinion and Order granting Respondents' motion to dismiss (hereinafter "Mem. Op. & Order", Petitioners' Appendix-2), the district court concluded that SCPI's claims were clearly barred by *res judicata* as a result of final orders entered in the FSI chapter 11 case. Mem. Op. & Order at p. 16. The district court also held that Merigian's claims were barred by *res judicata* because he was in privity with SCPI. *Id.* at p. 16-17. As an alternate ground for dismissing Merigian's claims, the district court concluded that Merigian had no standing to raise any of his claims because they were derivative to those of SCPI or FSI. *Id.* at 17-18. Further, the district court concluded that, even if Merigian's federal securities fraud claims were not barred by *res judicata*, or were not derivative to those of SCPI, those causes of action, as pled in his complaint, did not state any

claim upon which relief could be granted. *Id.* at 18-19. The district court also denied Merigian's pending motion for leave to file an amended complaint because he "failed to make any offer of allegations, which would survive a motion to dismiss." *Id.* at p. 19. All plaintiffs timely filed their notices of appeal from the district court's decision in the United States Court of Appeals for the Sixth Circuit, which properly exercised jurisdiction over the case pursuant to 28 U.S.C. §1291.

The court of appeals affirmed the district court's decision granting Respondents' Rule 12(b)(6) motions to dismiss. *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992). The court of appeals held that the district court correctly determined that the doctrine of *res judicata* barred the claims of Petitioners SCPI, Sanders, and Kreissl. 973 F.2d at 484-85. The court of appeals ruled that, under this Court's decision in *Stoll v. Gottlieb*, 305 U.S. 165 (1938), an order confirming a reorganization plan in a bankruptcy case is a final judgment for *res judicata* purposes. *Id.* at 480. The court of appeals also ruled that, under existing case law in the circuit courts of appeal, Petitioners SCPI, Sanders, and Kreissl were parties to the FSI chapter 11 case. *Id.* at 481. The court of appeals further determined that the claims asserted by SCPI in the district court were identical to the claims which were either raised or could have been raised in the FSI chapter 11 case. *Id.* at 483-84. In reaching this conclusion, the court of appeals rejected Petitioners' contention that their "lender liability", federal securities fraud, and RICO claims were not identical to the matters at issue in the FSI chapter 11 case and could not have been asserted in the bankruptcy court because they would have been "non-core" proceedings. *Id.* at 482-83. The court of appeals held that, even though a bankruptcy court may not have subject matter jurisdiction over "non-core" proceedings, because the claims at issue were clearly related to the FSI chapter 11 case, they fell within the bankruptcy jurisdiction of the district courts under 28 U.S.C. §1334(b) and could have been determined by the district court pursuant to 28 U.S.C. §157(c) or (d), if Petitioners had asserted such claims. *Id.* at 483. Thus, the court of appeals concluded that the Confirmation Order entered in the FSI chapter 11 case barred all SCPI's

claims, both "core" and "non-core", because the claims were related to the FSI chapter 11 case and, therefore, fell within the district court's general bankruptcy jurisdiction. *Id.* Contrary to Petitioner's suggestion, the court of appeals never addressed the question of whether the bankruptcy court could have conducted a jury trial over their "non-core" claims because Petitioners did not bring their claims in the FSI chapter 11 case and, of course, never demanded a jury trial on these alleged claims.

The court of appeals also ruled that the district court improperly dismissed Petitioner Merigian's claims on the grounds of *res judicata* because the issue of whether Merigian was in privity with SCPI or whether his interests were adequately represented by SCPI in the FSI chapter 11 case was a question of fact which should not have been resolved on a Rule 12(b)(6) motion to dismiss. *Id.* at 482. Nevertheless, the court of appeals held that the district court properly dismissed Merigian's federal securities fraud and RICO claims against Heller because he failed to plead any facts which would entitle him to relief under these statutes. Specifically, the court of appeals determined that, given the numerous and explicit factual allegations made by Merigian in the district court, dismissal of Merigian's claims under Section 12(2) of the 1933 Securities Act and Section 10(b) of the 1934 Securities Exchange Act, which were premised on a "controlling-person" liability theory, was proper because, under existing case law in the circuit courts of appeal, Heller's conduct in administering its loan to FSI could not, as a matter of law, constitute "control" over SCPI necessary for liability to attach under the federal securities laws. *Id.* at 485-86. Further, the court of appeals held that Heller could not be liable for an alleged Rule 10b-5 violation on an "aiding and abetting" theory because Merigian failed to allege that SCPI, the primary securities fraud violator, acted with scienter or "an intent to deceive, manipulate or defraud" as required by the Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). *Id.* at 486. Finally, the court of appeals ruled that Merigian's RICO claims were properly dismissed because he failed to allege properly any predicate acts which would constitute a RICO violation. *Id.* at 487. The court of appeals' August 17, 1992 Opinion and Judgment was thus is-

sued as the court's Mandate on September 9, 1992. The instant Petition for writ of certiorari followed.

SUMMARY OF ARGUMENT

Petitioners suggest that their Petition for a writ of certiorari should be granted to resolve the question of whether bankruptcy judges, who are not Article III judges, may conduct jury trials. While this issue is important to bankruptcy administration, it is totally irrelevant to the determination of this case.

The district court's jurisdiction in this case was invoked by Petitioners pursuant to 28 U.S.C. §1331 (which grants original jurisdiction to the district courts in cases involving federal questions), and not under 28 U.S.C. §1334 (which grants jurisdiction to the district courts over all bankruptcy cases and proceedings). This non-bankruptcy case, which was dismissed prior to trial, is simply not the vehicle for deciding whether a bankruptcy judge may constitutionally preside over a jury trial.

Petitioners' second argument as to why the Court should grant their Petition is that the courts below erred in applying the doctrine of *res judicata* to this case, which they claim resulted in the improper dismissal of their claims. There are four elements to the doctrine of *res judicata*: (1) a final judgment on the merits; (2) identical parties or privies; (3) the second action raises a claim which was actually litigated or should have been litigated in the first action; and (4) identity of the causes of action. Petitioners' specific contention of error in their Petition is that the third element, requiring that the subsequent action involve a claim which should have been litigated in the first action, is lacking. Petitioners' argue that the claims asserted in this case could not have been brought during the FSI chapter 11 case because the bankruptcy court would have not been able to exercise subject matter jurisdiction over their claims, if these claims had been asserted.

Petitioners' argument fails to recognize the distinction carefully drawn by the court of appeals in this case between the jurisdictional grant over all civil proceedings "arising in or related to cases under title 11" vested in the district courts by 28 U.S.C.

§1334(b) and the allocation of that jurisdiction between the Article III district judges and the Article I bankruptcy judges, which is set forth in 28 U.S.C. §157.

The bankruptcy court's jurisdiction to administer the FSI chapter 11 case and its authority to have entered the Confirmation Order is indisputable. The purported claims asserted by Petitioners in this case either arose prior to or during the course of the FSI chapter 11 case, and these claims could have, and should have, been asserted therein either as an independent proceeding or as an objection to the confirmation of the plan of reorganization. That Petitioners' claims or objections might not have been "core proceedings" and, therefore, would have been treated as related proceedings under 28 U.S.C. §157(c), or heard in their entirety by a district judge because of the mandatory withdrawal requirements of 28 U.S.C. §157(d), does not alter the uncontested fact that the district court had the jurisdiction to hear and determine any civil proceeding arising in or related to the FSI chapter 11 case. The existence of the third element of *res judicata* is to be determined by the jurisdiction of the first tribunal to hear a claim, and not which judicial officer of that tribunal renders the decision. Petitioners could have asserted their claims against Heller in the FSI chapter 11 case, and thereby, under *res judicata*, are prohibited from doing so in this case.

If the Court decides that it has jurisdiction to consider Petitioner Merigian's federal securities fraud claims, his Petition for a writ of certiorari should be denied because the only issue raised in his petition does not warrant review by the Court. Petitioner Merigian does not claim that the court of appeals' decision that the district court properly dismissed his "controlling person" claims under Section 12(2) of the 1933 Securities Act and Section 10(b) of the 1934 Securities Exchange Act is in conflict with any decision of this Court or in conflict with the decision of any other circuit court of appeals. The court of appeals correctly affirmed the dismissal of Merigian's "controlling person" claims because Heller could not, as a matter of law, control SCPI based solely on Heller's administration of its Loan Agreement with FSI, which is what Merigian alleged in the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. NEITHER THE DECISIONS BELOW NOR THE RECORD RAISES THE FIRST QUESTION PRESENTED IN THE PETITION.

The first question presented in the Petition is

> "Whether the Court erred in holding the Petitioners' non-core issues that are related to the bankruptcy could be adjudicated by the Bankruptcy Court with a jury trial."

However, the Sixth Circuit did not decide that question in this case. Moreover, the facts in the record will not support a determination of that question by this Court.

In its Opinion, the Sixth Circuit held that the Confirmation Order entered by the bankruptcy court in the FSI chapter 11 case was a final judgment which barred all claims which Petitioners SCPI, Sanders, and Kreissl either brought or could have asserted in the bankruptcy case, regardless of whether the claims are deemed "core" or "non-core" under 28 U.S.C. §157. The Sixth Circuit correctly concluded that because SCPI's claims asserted in this action were clearly related to the FSI chapter 11 case, the bankruptcy court and district court, if necessary, could properly have exercised subject matter jurisdiction over Petitioners' claims under 28 U.S.C. §1334(b). Therefore, because SCPI, Sanders, and Kreissl were parties to the FSI chapter 11 case, their claims asserted in this action are barred by *res judicata*.

It is undisputed that SCPI, Kreissl, and Sanders did not assert their purported lender liability, or any other, claims against Heller in the FSI chapter 11 case. It is also undisputed that Petitioners did not timely demand a jury on any claim they could have asserted in the FSI chapter 11 case under Rule 38 of the Federal Rules of Civil Procedure. Under Rule 38(d), Petitioners' failure to demand timely a jury constitutes a waiver of their right to a jury trial. *See In the Matter of Muller*, 851 F.2d 916, 919-20

(7th Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *see also K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914 (1st Cir. 1989); *Irvin v. Airco Carbide*, 837 F.2d 724, 727 (6th Cir. 1987). Thus, Petitioners have failed to preserve for review any right to a jury trial they might have had regarding any "non-core" claim they should have asserted in the FSI chapter 11 case.

It is further undisputed that Petitioners were not denied any jury trial rights in this action since their claims were dismissed prior to trial. Thus, Petitioners' suggestion to the Court that this case presents an opportunity for the Court to decide the difficult issue of whether Article I bankruptcy judges are empowered to conduct jury trials is entirely unfounded. This case simply does not involve any question as to whether Petitioners were unconstitutionally denied their Seventh Amendment right to a trial by jury.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE DOCTRINE OF RES JUDICATA TO THE CLAIMS OF PETITIONERS SCPI, SANDERS, AND KREISSL AND ITS DECISION THAT THE FSI CONFIRMATION ORDER BARS CLAIMS WHICH WOULD HAVE BEEN "NON-CORE" IF ASSERTED THEREIN IS IN ACCORD WITH THE JURISDICTIONAL GRANT TO THE DISTRICT COURTS OVER ALL MATTERS RELATED TO BANKRUPTCY CASES.

While Petitioners have attempted to grab the Court's attention by trumpeting that this case purportedly involves the "bankruptcy jury trial" question, their real dispute with the court of appeals is its conclusion that, because their claims were clearly related to the FSI chapter 11 case, Petitioners should have asserted those claims in that case. However, the court of appeals' decision in this regard is in accord with the *res judicata* decisions rendered by the other courts of appeal in the bankruptcy context. Thus, because the courts of appeals' decision is not in conflict with any decision of this Court and does not conflict with any decision of

the circuit courts, there is no *res judicata* issue presented by Petitioners which would warrant granting their Petition.

Under the doctrine of *res judicata*, a final judgment on the merits bars parties or their privies from relitigating issues which were or could have been raised in a prior lawsuit involving the same transactions. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377-78 (1940). As long as the court which rendered the judgment had jurisdiction, even an erroneous determination is *res judicata* and not subject to collateral attack. *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). *Res judicata* promotes finality of judgments, increases certainty, discourages multiple litigation, and conserves judicial resources. *See King v. South Central Bell Tel. & Tel. Co.*, 790 F.2d 524, 528 (6th Cir. 1986). Additionally, the application of *res judicata* to claims which could have been brought during a chapter 11 case is especially important because "[a] strong interest to achieve *finality* pervades Chapter 11 arrangements." *Oneida Motor Freight Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir.)(citation omitted) (emphasis added), *cert. denied*, 488 U.S. 967 (1988).

In its Opinion, the court of appeals in this case correctly set forth the four elements of *res judicata:*

> "1. A final decision on the merits in the first action by a court of competent jurisdiction;
>
> 2. The second action involves the same parties, or their privies, as the first;
>
> 3. The second action raises an issue actually litigated or which should have been litigated in the first action;
>
> 4. An identity of the causes of action."

973 F.2d at 480 (citations omitted).

Petitioners SCPI, Sanders, and Kreissl have not requested that this Court review any question as to whether the Confirmation Order entered by the bankruptcy court in the FSI chapter 11

case was a final judgment or whether they were parties to the FSI Chapter 11 case. Rather, Petitioners argue, *albeit* obliquely, that they should not have been required by the courts below to bring their "non-core" claims in the FSI chapter 11 case even though those claims were clearly related to that case. However, Petitioners' argument misses the mark. The doctrine of *res judicata* bars all claims which either were or *could have* been brought in the prior proceeding. Because Petitioners' claims were clearly related to the FSI chapter 11 case, they *could have* been asserted therein because 28 U.S.C. §1334(b) vests jurisdiction over all civil bankruptcy proceedings in the district courts, including their bankruptcy units. *See* 28 U.S.C. §151. The "procedures" which allocate jurisdiction over bankruptcy cases between the district courts and their bankruptcy units which are set forth in 28 U.S.C. §157 do not diminish the general bankruptcy jurisdiction granted to the district courts under section 1334(b). Therefore, Petitioners' "non-core" claims could have been first asserted in the FSI chapter 11 case. Petitioners do not, and cannot, suggest that they did not have every opportunity to assert their claims against Respondents in the FSI chapter 11 case but, for whatever tactical reasons, intentionally chose not to do so. This tactical choice now bars SCPI, Sanders, and Kreissl from asserting their claims in this case.

At least two circuit courts of appeal are in accord with the Sixth Circuit's reasoning on this issue. *See Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869 (2d Cir. 1991); *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992). Further, the court of appeals' decision in this case does not conflict with the Seventh Circuit's decision in *Barnett v. Stern*, 909 F.2d 973 (7th Cir. 1990). Because Petitioners SCPI, Sanders, and Kreissl clearly consented to the bankruptcy court's jurisdiction in the FSI chapter 11 case by extensively participating in the proceedings which occurred therein, as set forth above, even in the Seventh Circuit, Petitioners' "non-core" claims would be barred by *res judicata*. *See In the Matter of Kroner*, 953 F.2d 317, 321 (7th Cir. 1992). Therefore, because the Sixth Circuit's decision does not conflict with any other circuit court decision which has addressed the issue of whether the doctrine of *res judicata* bars all claims which are related to a chapter 11 case when the parties

have consented to the bankruptcy court's jurisdiction, the Court should deny the Petition for this reason as well.

III. THE COURT OF APPEALS CORRECTLY DECIDED THAT, DESPITE HIS EXTENSIVE ALLEGATIONS IN THE DISTRICT COURT, PETITIONER MERIGIAN FAILED TO STATE A CLAIM OF CONTROLLING PERSON LIABILITY AGAINST HELLER UNDER THE FEDERAL SECURITIES LAWS.

Petitioner Merigian requests that the Court grant review on only one question which was decided by the court of appeals: whether Heller's administering of its loan to FSI subjects Heller to "controlling person" liability under Section 12(2) of the 1933 Securities Act, 15 U.S.C. §77l(2), or Section 10(b) of the 1934 Securities Exchange Act, 15 U.S.C. §78j. While noting that there is some disagreement among the circuit courts regarding the test for determining liability as a "controlling person" under the federal securities laws, the court of appeals in this case determined that, even under the most liberal pleading standards set forth in *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986), Merigian still failed to state a "controlling person" claim in the district court because he failed to allege that "Heller 'actually participated in the operations' of SCPI, other than by making secured loans" to FSI. *See* 973 F.2d at 485-86. By his Petition, Merigian essentially requests that this Court formulate a new legal test for determining when a lender can be a "controlling person" under the federal securities laws — a test which is not currently utilized in any of the courts of appeal. The Court should properly reject Merigian's invitation because he has presented no compelling reason why the test used by the court of appeals in this case is not in accord with prior decisions of this Court, with the decisions of the other courts of appeal, or with Congress' legislative intent when it enacted the federal securities laws.

As stated by the court of appeals in this case, a control relationship necessary to subject a lender to "controlling person"

liability under the federal securities laws requires, at a minimum, that the defendant actually participate in, *i.e.*, exercise control over, the operations of the allegedly "controlled" person and that the defendant possess the power to control the specific transactions or activities upon which the primary violation is predicated. 973 F.2d at 486. *See Schlifke v. SeaFirst Corp.*, 866 F.2d 935, 949 (7th Cir. 1989) (citing *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986)). The court of appeals correctly determined that Merigian failed to adequately allege in the district court a "controlling person" claim under the federal securities laws because "[e]xtending a loan to a company and taking measures to secure that loan do not amount to actual control." 973 F.2d at 486. This conclusion is in accord with the decisions of the other circuit courts which have considered "controlling-person" claims in the context of a debtor/creditor relationship and is supported by the law and sound policy reasons as well. Therefore, the court of appeals' decision on this issue does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

LF

CF 10398

STATE OF MICHIGAN
DEPARTMENT OF PUBLIC HEALTH

CERTIFICATE OF DEATH

STATE FILE NUMBER
0431678

1. DECEDENT'S NAME (First, Middle, Last) SAM JOHN MERIGIAN		2. SEX MALE	3. DATE OF DEATH (Month, Day, Year) NOVEMBER 18, 1991
4a. AGE - Last Birthday (Years) 63	4b. UNDER 1 YEAR Months / Days	4c. UNDER 1 DAY Hours / Minutes	5. DATE OF BIRTH (Month, Day, Year) MARCH 29, 1928	6. COUNTY OF DEATH WAYNE
7a. LOCATION OF DEATH (Name of facility - if not in a facility, give street and number) HENRY FORD HOSPITAL		7b. IF INSIDE CITY LIMITS, SPECIFY EMERGENCY ROOM	7c. CITY, VILLAGE OR TOWNSHIP OF DEATH DETROIT
8. SOCIAL SECURITY NUMBER 374 26 3153	9a. USUAL OCCUPATION (Give kind of work done during most of working life. Do not use retired) PERSONNEL DIRECTOR		9b. KIND OF BUSINESS OR INDUSTRY GOVERNMENT
10a. USUAL RESIDENCE (Where deceased lived) STATE MICHIGAN	10b. COUNTY WAYNE	10c. INSIDE CITY LIMITS? ☒ YES ☐ NO If yes, CITY OR TOWNSHIP OF HIGHLAND PARK	10d. STREET AND NUMBER 150 PURITAN
10e. ZIP CODE 48203	11. MARRIAGE (Only one; give current or former husband or wife) HIGHLAND PARK MICHIGAN	12. MARITAL STATUS (Married, Never Married, Widowed, Divorced) MARRIED	13. SURVIVING SPOUSE (If wife, give name before first marriage) DIANNE M. ZYSKOWSKI	14. WAS DECEDENT EVER IN U.S. ARMED FORCES? YES
15. RACE - American Indian, Black, White, etc. ARMENIAN	16. DECEDENT OF HISPANIC ORIGIN? (Specify No, Yes - Mexican, Puerto Rican, Cuban, Central or South American, Other Hispanic, Not Hispanic) WHITE	17. EDUCATION (Specify only highest grade completed) Elementary/Secondary (0-12)	College (13-17 or more)
18. FATHER'S NAME (First, Middle, Last) JOHN SAM MERIGIAN		19. MOTHER'S NAME (First, Middle, Last, Before First Marriage) ZYKOCUHY KEOSHEKASHIAN	
20a. INFORMANT'S NAME (Type or Print) DIANNE M. MERIGIAN	20b. MAILING ADDRESS (Street and Number or Rural Route Number, City or Town, State, Zip Code) 150 PURITAN, HIGHLAND PARK, MICHIGAN 48203		
21. METHOD OF DISPOSITION (Burial, Cremation, Removal, Donation, Other (Specify)) BURIAL	22. PLACE OF DISPOSITION (Name of Cemetery, Crematory, or other place) EVERGREEN CEMETERY	23. LOCATION (City or Town, State) DETROIT, MICHIGAN	
24. SIGNATURE OF FUNERAL SERVICE REPRESENTATIVE [signature]	25. LICENSE NUMBER (Of Funeral Director) 5305	26. NAME AND ADDRESS OF FACILITY EDWARD MORRISON FUNERAL HOME, INC. 836 W. MAPLE ST., ROYAL OAK, MICHIGAN 48067	

27. PART I. Enter the diseases, injuries, or complications that caused the death. Do NOT enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line.

IMMEDIATE CAUSE (Final disease or condition resulting in death) a. Bronchogenic carcinoma, Liver — Approximate Interval Between Onset and Death: 2 mo

Sequentially list conditions, if any, leading to the immediate cause. Enter UNDERLYING CAUSE (Disease or injury that initiated the events resulting in death) LAST

b. [blank]

c. [blank]

Part II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I

28. WAS MEDICAL EXAMINER OR CORONER CONTACTED? No

29. WERE AUTOPSY FINDINGS AVAILABLE TO COMPLETE CAUSE OF DEATH? (Yes or No)

30. PLACE OF DEATH (Hospital, Nursing Home, Residence, Other (Specify)) Henry Ford Hosp.

31. WAS CASE REFERRED TO MEDICAL EXAMINER OR CORONER? (Yes or No) Yes

32. I CERTIFY THAT DEATH OCCURRED AT THE TIME, DATE, AND PLACE AND DUE TO THE CAUSE(S) AND MANNER STATED. [signature] (MD)

Operation and Date: 11/18/91

Time of Death: 3:04 AM

Date Signed: Nov 19, 1991

33. CASE NUMBER #9362-91

34. NAME AND ADDRESS OF PERSON WHO COMPLETED CAUSE OF DEATH (Item 27) (Type or Print) STEWART E. Fraser MD 15 St. Wilkins Mile - Room Oak Mi. 48073

35. LICENSE NUMBER 025511

36. SIGNATURE OF PERSON WHO COMPLETED CAUSE OF DEATH [signature]

37. DATE SIGNED (Month, Day, Year)

38. TIME OF DEATH

39. MEDICAL EXAMINER CASE NUMBER

40. PLACE OF DEATH (If other than 30, specify)

41. LOCATION (Name of City, Village or Township) (Zip Code)

42. REGISTRAR'S SIGNATURE Gloria J. Harper

43. DATE FILED (Month, Day, Year) NOV 19 1991

THIS CERTIFIES THAT THE ABOVE IS A TRUE COPY OF FACTS RECORDED ON THE RECORD OF THE PERSON NAMED HEREON, AS FILED AT THE DETROIT DEPARTMENT OF HEALTH.

Gloria J. Harper
GLORIA J. HARPER
REGISTRAR, VITAL RECORDS
DETROIT DEPARTMENT OF HEALTH

DEC 11 1992
DATED

Coleman A. Young, Mayor
City of Detroit

THE BACK OF THIS DOCUMENT CONTAINS AN ARTIFICIAL WATERMARK — HOLD AT AN ANGLE TO VIEW

BEST AVAILABLE COPY